SUPREME COURT OF QUEENSLAND

CITATION:	*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QSC 144
PARTIES:	**SANRUS PTY LTD AS TRUSTEE OF THE QC TRUST ACN 097 049 315** (first plaintiff) and **EDGE DEVELOPMENTS PTY LTD AS TRUSTEE OF THE KOWHAI TRUST ABN 26 010 309 529** (second plaintiff) and **H&J ENTERPRISES (QLD) PTY LTD AS TRUSTEE OF THE H&J TRUST ACN 077 333 736** (third plaintiff) **v** **MONTO COAL 2 PTY LTD ACN 098 919 414** (first defendant) and **MONTO COAL PTY LTD ACN 098 393 072** (second defendant) and **MACARTHUR COAL LIMITED ACN 096 001 955** (third defendant)
FILE NO:	8609 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2019
JUDGE:	Flanagan J
ORDER:	**1. The plaintiffs' application filed 20 May 2019 is dismissed;** **2. Leave is granted to the defendants to amend their List of Documents served 31 July 2017 to mark document MAC.101.089.2555 ("the Document") as partly privileged pursuant to r 375 of the Uniform Civil Procedure Rules 1999 (Qld);** **3. With respect to the Document the plaintiffs must,**

within seven days of the making of this order:

(a) deliver up all hard copies of the Document in their possession, custody or power to the solicitors for the defendants;

(b) return any computer disk containing copies of the Document in their possession, custody or power to the solicitors for the defendants; and

(c) delete all electronic copies of the Document.

4. The Document currently on the Online Review Book be replaced with a version that redacts page 2564 for privilege.

5. I will hear the parties as to costs.

CATCHWORDS: EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – CLIENT LEGAL PRIVILEGE – LOSS OF PRIVILEGE – ISSUE WAIVER – where the plaintiffs and first defendant entered into a joint venture agreement for the exploitation of a coal resource – where a clause in the agreement required the parties to use all reasonable efforts to develop stage 1, having regard to all relevant factors and the economic viability of the project – where the first defendant decided not to develop stage 1 – where the parties' pleadings join issue on the meaning of the clause – where, in the alternative, the defendants plead that there was a common assumption that stage 1 would not go ahead unless the project was economically viable – where the plaintiffs further plead that, in refusing to go ahead with the project, the first defendant failed to act in good faith and reasonably, and that the third defendant intentionally induced the first defendant to breach the agreement – where the defendants assert they acted in good faith and reasonably, and in accordance with what they believed to be the proper construction of the agreement – where, during the conduct of the trial, the defendants' counsel have asked the plaintiffs' lay witnesses questions concerning their belief as to the meaning of the agreement – whether, by reason of their pleading and their conduct of the trial to date, the defendants have asserted states of mind in a way which is inconsistent with the maintenance of privilege over legal advice that is pertinent to the asserted states of mind so as to amount to an implied waiver of privilege

EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – CLIENT LEGAL PRIVILEGE – LOSS OF PRIVILEGE – IMPLIED WAIVER – where the proceeding is a large commercial case with voluminous disclosure – where the defendants inadvertently disclosed a note containing a summary of legal advice – where the note had

previously been disclosed on six occasions in a form that redacted the summary of legal advice – where the defendants filed and served a summary of evidence referring to the unredacted note without referring to the summary of the legal advice specifically – where the trial judge referred in passing to the summary of legal advice – where the plaintiffs tendered a list of documents including the unredacted note – where, over a month later, the plaintiffs' solicitors asserted that the defendants had waived privilege over the legal advice – where it was only then that the defendants' solicitors realised that there had been an inadvertent disclosure of the summary of the legal advice – whether, by their failure to object, the defendants have impliedly waived privilege over their legal advice

EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – CLIENT LEGAL PRIVILEGE – LOSS OF PRIVILEGE – IMPLIED WAIVER – where the defendants have disclosed a partially redacted file note of a meeting between a now deceased witness and the defendants' solicitors – whether, by disclosing a partially redacted version of the file note, the defendants are taken to have impliedly waived privilege over the file note in its entirety

Uniform Civil Procedure Rules 1999 (Qld), r 223, r 375

Alstom Power v Yokogawa Australia Pty Ltd (No 5) [2010] SASC 267, cited
Archer Capital 4A Pty Ltd v Sage Group Plc (No 3) (2013) 306 ALR 414, cited
Attorney-General (NT) v Maurice (1986) 161 CLR 475, cited
Boensch v Pascoe [2007] FCA 532, cited
Commissioner of Taxation v Rio Tinto Ltd (2006) 151 FCR 341, considered
Council of the New South Wales Bar Association v Archer (2008) 72 NSWLR 236, cited
Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305, cited
Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd (2013) 250 CLR 303, considered
Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529, cited
Insurance Commission of Western Australia v Woodings [2018] WASC 249, considered
Macquarie Bank Limited v Arup Pty Limited [2016] FCAFC 117, cited
MAM Mortgages Limited (in liq) v Cameron Bros. (No. 2) [2001] 1 Qd R 46, cited
Mann v Carnell (1999) 201 CLR 1, cited
New South Wales v Betfair Pty Ltd (2009) 180 FCR 543,

cited
Nine Films and Television Pty Ltd v Ninox Television Ltd (2005) 65 IBR 442, cited
Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors [2018] QSC 317, distinguished
Osland v Secretary to Department of Justice (2008) 234 CLR 275, cited
Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd [1989] 2 Qd R 40, cited
Queensland Local Government Superannuation Board v Allen [2016] QCA 325, cited
Thomason v Campbelltown Municipal Council (1939) 39 SR(NSW) 347, cited
Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd [2015] VSCA 101, cited
Viterra Malt Pty Ltd v Cargill Australia Ltd [2018] VSCA 118, cited

COUNSEL: D B O'Sullivan QC with J O'Regan for the plaintiffs
J C Sheahan QC with E L Hoiberg for the defendants

SOLICITORS: Holding Redlich for the plaintiffs
Allens for the defendants

[1] The plaintiffs, pursuant to r 223(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld), seek orders that the defendants produce three categories of documents for inspection. The plaintiffs also seek further disclosure. The application is brought in circumstances where the matter is now in its sixth week of trial before Bond J.

[2] The Category 1 documents encompass legal advice for which legal professional privilege has been claimed,[1] unredacted copies of documents that were produced for inspection and had redactions made to parts of the document,[2] and copies of documents containing or evidencing confidential communications between a client and legal advisor and in the possession or under the control of one of the defendants.[3]

[3] The Category 1 documents are limited to copies of documents that are directly relevant to the issues identified in paragraphs 1 to 7 of Schedule A to the plaintiffs' application. These issues are said to be founded upon a number of paragraphs in the defence.

[4] The plaintiffs accept that the Category 1 documents (as well as the Category 2 and the Category 3 documents dealt with below) originally were subject to legal professional privilege but contend that the defendants have waived that privilege.[4]

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1 As listed in Part 2 of Schedule 1 of the list of documents served by the defendants on or about 31 July 2017: Exhibit TMB-1 to the affidavit of Toby Michael Boys filed 22 May 2019, page 24.
2 As listed by the defendants in Part 1 of Schedule 1 of their list of documents.
3 Plaintiffs' Application filed 20 May 2019, paragraph 1(a), Schedule A(i)-(iii).
4 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 3.

[5] The issue to be determined in respect of the Category 1 documents is whether the defendants have pleaded and conducted a case about their state of mind in a manner that effects an implied waiver of privilege in respect of legal advice relevant to that state of mind.[5] The defendants identify the relevant issue in the following terms: [6]

> "… whether the defendants have put their state of mind as to their legal rights and obligations in issue on the pleadings, such that it would be inconsistent for the defendants to withhold legal advice which informed that state of mind." (**the First Issue**)

[6] The Category 2 documents are legal advices from Mr Bill Boyd (and associated documents) received by the defendants, and other advice received by the defendants on the same subject matter as the advice from Mr Boyd. Mr Boyd was, at the relevant times, a legal advisor to the defendants.

[7] Waiver of the Category 2 documents is alleged to have occurred by reason of the defendants' conduct, including inadvertently disclosing a "summary of advice" of Mr Boyd in 2017 and subsequent conduct.[7]

[8] The issue in respect of the Category 2 documents is identified by the defendants as follows:[8]

> "… whether the defendants' inadvertent disclosure of legal advice and the plaintiffs' subsequent tender of the document have waived privilege in the legal advice and associated communications, or whether the defendants are entitled to an order that versions of the unredacted document be destroyed." (**the Second Issue**).

[9] The order referred to in the Second Issue, namely that versions of the unredacted document be destroyed, is one of the orders sought by the defendants in an application filed 22 May 2019.

[10] The Category 3 document is an unredacted copy of a file note of Sarah Frost dated 9 October 2017.[9] Ms Frost was one of the defendants' then solicitors. The file note relates to a conference with Mr Ken Talbot, a former officer of the defendants. Mr Talbot is now deceased. Only a portion of the note is unredacted: the remainder is redacted, with the defendants claiming legal professional privilege.[10]

[11] The issue is whether the defendants ought to be required to produce an unredacted copy of the file note in respect of which privilege has already been partially expressly waived (**the Third Issue**). As to the Category 3 document, the parties accept that the appropriate course is for the Court to inspect the document and resolve the application

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5 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 40.
6 Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 1(a).
7 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 49.
8 Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 1(b).
9 MAC.906.001.0134.
10 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 92.

by determining whether the redacted portion deals with matters upon which, as a matter of fairness, the plaintiffs ought to see, or a separate subject matter.[11]

The First Issue

[12] In order to determine the First Issue, it is necessary to identify both the issues that arise on the pleadings and the evidence the defendants have sought to elicit in the course of the trial being conducted before Bond J.

[13] The background giving rise to the proceeding is conveniently set out in paragraphs 4 to 14 of the plaintiffs' submissions which I set out:

"4. The plaintiffs occupy the position of the junior joint venture partner and the first defendant (**Monto Coal 2**), that of the senior joint venture partner. The second defendant (**Monto Coal**) was the manager of the joint venture under a management agreement. The third defendant (**Macarthur Coal**) has either owned all or the majority of the shares in the first and second defendants.

5. In May 2002 the plaintiffs and Monto Coal 2 entered into a written joint venture agreement (**Joint Venture Agreement**) which referred to two stages in the possible exploitation of the subject coal resource:

(a) Stage 1, namely 'mining operations producing between 1,000,000 and 1,500,000 tonnes of saleable coal per annum'; and

(b) Stage 2, namely 'the mine development and mining operations beyond Stage 1 with the expectation of production being 10,000,000 tonnes or more of saleable coal per annum'.

6. Central to the claims in the proceeding are the obligations imposed by the Joint Venture Agreement on the parties to develop Stage 1 and undertake a Feasibility Study for Stage 2.

7. Clause 5.1 provides:

> The Participants [i.e. the plaintiffs and Monto Coal 2] must use all reasonable efforts to obtain the grant of the Mining Lease and to, having regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project, develop Stage 1 within 3 years of the Commencement Date [i.e. by 16 May 2005]. For the avoidance of doubt, Monto Coal 2 agrees not to have regard to the profitability of any other ventures entered or to be entered into by its holding company, Macarthur Coal, or any of its Related Corporations.

8. Cause 6 provides the Participants '*agree to undertake the Stage 2 Feasibility Study during the Stage 1 Mine Development*'.

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[11] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 102; Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 44.

9. Clause 5.2 provides that Monto Coal 2 is solely liable for and must meet all Cash Calls relating to the Mine Development for Stage 1, the costs of the Stage 2 Feasibility Study and all costs incurred in proving up the entire resource.

10. Clause 7 of the Joint Venture Agreement provides for a Management Committee. Clause 7.5 requires each Participant's Representative on the committee to exercise that Participant's vote '*in the best interests of the Joint Venture, as determined in accordance with clause 7.6*'.

11. Clause 7.6 provided that in determining what is in the best interests of the Joint Venture, that, among other things, '*regard must not be had to interests extraneous to the Joint Venture, including without limitation, a Participant's individual position or matters peculiar to a Participant*'.

12. The Joint Venture Agreement also required the Participants to act in good faith towards the other Participants: clause 4.1.

13. On 4 July 2003, Mr Adams, Monto Coal 2's Representative on the Joint Venture Management Committee, voted in favour of a resolution to suspend all work on the project. Given Monto Coal 2's majority interest, the resolution was carried (**Suspension Decision**).

14. To date, Stage 1 has not been developed, nor has the Stage 2 Feasibility Study been undertaken." (footnotes omitted)

[14] On the pleadings, one of the primary matters in contention is the proper construction of clause 5.1 of the Joint Venture Agreement. The plaintiffs allege that on a proper construction of the Joint Venture Agreement, Monto Coal 2 was required to use all reasonable steps to develop Stage 1 of the mine by 16 May 2005.[12] The defendants deny this construction for the reasons set out in paragraph 83 of the defence.

[15] In addition to denying the plaintiffs' construction of clause 5.1, the defendants plead an estoppel by convention, namely that the parties shared a common assumption that until the Monto Coal Project was economically viable, there was no obligation upon the parties to the Joint Venture Agreement to proceed to establish Stage 1. The estoppel by convention is pleaded at paragraph 83A(b) of the defence:

> "At all material times until at least 16 May 2005, the parties to the Joint Venture Agreement shared a common assumption that, until the Monto Coal Project was economically viable, there was no obligation upon the parties to proceed to establish Stage 1.
>
> **Particulars**
>
> (i) the existence of the common assumption is to be inferred from the exchanges pleaded in paragraphs 106, 113, 118, 123, 126 and 127 of Schedule 2 to this Defence and paragraphs 131 and 137A of Schedule 3 to this Defence."

[12] Second Further Amended Consolidated Statement of Claim filed 21 May 2019, paragraph 11(a).

The “exchanges” referred to in the particulars arise from seven Management Committee Meetings and a further meeting between representatives of Monto Coal 2 and representatives of the plaintiffs.

[16] Paragraph 83A(c) of the defence pleads that from 15 August 2002 to at least 16 May 2005, the plaintiffs represented to the defendants that they need not proceed to establish Stage 1 of the Monto Coal Project until the project was economically viable. These representations are particularised as having been communicated by Mr Wallin on behalf of the plaintiffs, in the form of statements and conduct. Paragraph 83A(d) pleads that in reliance upon each of the said common assumptions and representations, Monto Coal 2 took no steps to complete development of Stage 1 of the mine by 16 May 2005, to produce the Stage 2 Feasibility Study or to seek a court determination as to its obligations.

[17] An important aspect of the plaintiffs’ case is the allegation that at the time Monto Coal 2 voted to suspend all work on the project and at all times thereafter until 31 December 2008, it did so by taking into account matters which were expressly prohibited by the Joint Venture Agreement.[13] These matters included Monto Coal 2 seeking to avoid its obligation to fund all expenditure for the development of Stage 1 and undertaking the Stage 2 Feasibility Study.[14] The plaintiffs, in paragraph 22 of the statement of claim, allege that in engaging in conduct including voting for the suspension of the Monto Coal Project, Monto Coal 2 failed to act in good faith and reasonably. The defendants deny this allegation and plead as follows:

> “129C By 4 July 2003, Monto Coal 2:
>
> (a) had had regard to:
>
> (i) all relevant factors relating to the Monto Coal Project; and
>
> (ii) the economic viability of the Monto Coal Project; and
>
> (b) consequently formed the intention to take no steps to cause the Joint Venture Management Committee to make the decisions which would be necessary to complete development of Stage 1 of the mine by 16 May 2005.
>
> **Particulars**
>
> (i) Ken Talbot, Keith De Lacy, Don Nissen, and Roger Marshall as directors of Monto Coal 2 had regard to the matters in subparagraph (a) and formed the intention referred to in subparagraph (b) on behalf of Monto Coal 2.
>
> (ii) The ‘relevant factors’ to which regard was had were:
>
> (A) the decline in thermal coal prices;
>
> (B) the decline in demand for thermal coal;
>
> (C) the uncertainty about the cost to upgrade the railway from the Monto Project site to the Port of Gladstone;

[13] Second Further Amended Consolidated Statement of Claim filed 21 May 2019, paragraphs 20-21.
[14] Second Further Amended Consolidated Statement of Claim filed 21 May 2019, paragraph 21(a) to (f).

(D) the fact that the railway between Monto and Gladstone was only capable of railing a maximum of 880,000 tonnes of coal per annum;

(E) the uncertainty as to whether the Project would have access to water or sufficient water;

(F) the uncertainty about whether there would be a market for 10 million tonnes of Monto coal;

(G) the inferior quality of the Monto coal, in particular its HGI value;

(H) the multiple seam nature of the Monto Project and the difficulties associated with multiple seam mining;

(I) uncertainty about whether there was a means to export 10 million tonnes of Monto coal;

(J) opposition by landowners to the grant of a mining lease in respect of the Project;

(K) the meetings, correspondence, financial models, studies and reports referred to in Schedule 2 to this Defence;

(L) the statements made by Mr Wallin referred to in paragraphs 123(b) to (g) and 126(e) and (f) of Schedule 2 to this Defence.

129D The intention of Monto Coal 2 to take no steps to cause the Joint Venture Management Committee to make the decisions which would be necessary to complete development of Stage 1 of the mine by 16 May 2005 was formed:

(a) in good faith in accordance with the requirements of clause 4.1(f) of the Joint Venture Agreement; and

(b) reasonably in accordance with the requirement in clause 5.1 of the Joint Venture Agreement that the Participants use “reasonable efforts’.

…

156E In the premises of paragraphs 142B to 147 ~~156D~~ of Schedule 3 to this Defence, in the period between 16 May 2005 and 31 December 2008 ~~May 2012~~, Monto Coal 2:

(a) has assessed whether it should take steps to cause the Joint Venture Management Committee to make the decisions necessary to develop a mine;

(b) in consequence of that assessment has formed the view that it ought not to take those steps;

(c) conducted its assessment and formed its view in good faith in accordance with the requirements of clause 4.1(f) of the Joint Venture Agreement;

(d) if (which is not alleged by the plaintiffs and is not admitted by the defendants) clause 5.1 of the Joint Venture Agreement required the Participants to make "reasonable efforts" in the period after 16 May 2005, conducted its assessment and formed its view reasonably in accordance with that requirement."

[18] A further allegation made by the plaintiffs in the statement of claim is that the third defendant, Macarthur Coal, knowing of certain pleaded matters, has caused and continued (until 31 December 2008) to cause Monto Coal 2 to breach its contractual obligations as pleaded at paragraphs 20, 21, 22, 27 and 28 of the statement of claim.[15] Macarthur Coal denies that it intended that Monto Coal 2 would act in breach of its contractual obligations and further pleads by paragraph 187(b)(iv) and (v) of the defence as follows:

"(b) the defendants otherwise deny the allegations and believe that they are untrue because:

…

(iv) the matters set out in paragraph 30(b) of the statement of claim are incapable of giving rise to an inference that Macarthur Coal caused and continues to cause Monto Coal 2 to do and to continue to do the things pleaded in paragraphs 20 and 27 of the statement of claim;

(v) for the reasons pleaded in response to paragraph 29 of the statement of claim Macarthur Coal did not have the knowledge or intention alleged."

[19] The relevant paragraphs of the statement of claim and the defence identified above encompass each of the issues stated in paragraphs 1 to 7 of Schedule A to the plaintiffs' application. These issues are distilled into four primary issues in the defendants' written submissions, which for convenience I will adopt. The four issues are:

(a) the common assumption as to the obligation to develop Stage 1;

(b) reliance;

(c) Monto Coal 2 acted in good faith and reasonably; and

(d) the claim against Macarthur Coal for inducing breach of contract.

As a preliminary observation it may be accepted that nowhere in the defence do the defendants expressly plead in relation to these four issues any reliance on legal advice.

[20] As to the defendants' relevant conduct in the course of the trial, the transcript references for this purpose are exhibited to the affidavit of Ms Thorpe.[16] The relevant extracts

[15] Second Further Amended Consolidated Statement of Claim filed 21 May 2019, paragraphs 29 and 30.

[16] Exhibits WJT-3 and WJT-4 to the affidavit of Wylie Jane Thorpe filed 23 May 2019.

from the transcript are set out in paragraphs 15, 16 and 19 of Ms Thorpe's affidavit. The first transcript is questioning by Mr O'Shea QC, Senior Counsel for the plaintiffs, of Mr Wallin who was a director of the first plaintiff. The following exchange occurred:[17]

> "Did you in fact believe that there was no obligation for Stage 1 to be developed while economics are negative?-- No.
>
> Why didn't you correct this at the time?-- In the context of the discussion at the meeting I was talking about the fact that we could develop Stage 1 and if the coal prices remained low and the feasibility of developing …
>
> MR SHEAHAN: Your Honour, I object to this. It seems to be a reconstruction. …
>
> MR O'SHEA: No it's not. This goes to Mr Wallin's state of mind. …
>
> MR SHEAHAN: Your Honour, if it's clear that it's going to the witness's state of mind then that's alright."

[21] In the course of the cross-examination of Mr Wallin by Mr Sheahan QC the following exchange occurred:[18]

> "Now, you understood, I suggest, that under the Joint Venture Agreement the parties were obliged to take all relevant matters into account in determining how to progress Stage 1?—Yes.
>
> And they – and you understood that they were obliged in particular to take the economic viability of a project into account in determining how to progress Stage 1?—Yes.
>
> And you understood that that meant that Stage 1 might, consistently with the Joint Venture Agreement, be developed differently than the definition provided for Stage 1 in the joint venture?—I – it – I'm – it's – it's possible if – if there were compelling circumstances which were agreed by the parties to vary the – the project.
>
> And you understood that the obligation to take all relevant matters into account, including economic viability in determining how to progress Stage 1, might justify a decision to delay the commencement of Stage 1, consistently with the Joint Venture Agreement?—No.
>
> And you understood that the parties' obligation to take into account all relevant matters, including economic viability, might, consistently with the Joint Venture Agreement, permit them to suspend the development of Stage 1?—No."

[22] Later in the cross-examination the following exchange occurred:[19]

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[17] Exhibit WJT-3 to the affidavit of Wylie Jane Thorpe filed 23 May 2019, pages 50-51.
[18] Exhibit WJT-3 to the affidavit of Wylie Jane Thorpe filed 23 May 2019, pages 50-51.
[19] Exhibit WJT-3 to the affidavit of Wylie Jane Thorpe filed 23 May 2019, pages 56-57.

"And it wasn't your view at that stage that under the Joint Venture Agreement Stage 1 had to be developed even if the project was not economically viable, was it?-- Yes.

…

Your belief at this time, Mr Wallin, was that under the Joint Venture Agreement it was perfectly legitimate for the joint venturers to conclude that no more should be done with Stage 1 while the project as a whole did not appear to be economically viable?—No.

And Monto Coal 2 was not obliged to continue to spend money developing Stage 1 while the project as a whole did not appear to be viable?—No."

[23] Mr Pomerenke QC, in the evidence in chief of Mr Marshall, a witness for the defendants, asked the following questions:[20]

"… Thank you, Mr Marshall, moving to another topic now, on 16 May 2002, the parties entered into a Joint Venture Agreement, and you're familiar with the Joint Venture Agreement between the plaintiffs and the defendants in this case?—I am.

… There's a particular clause I'm interested in. It's 5.1, if we could go there please, Mr Operator. You'll see 5.1 'Stage 1 development'?—Yes.

… Do you recall seeing that clause at around that time?-- Yes I do.

… At that time, did you have a view about Monto Coal 2 Pty Ltd's obligations regarding the development of Stage 1 of Monto Coal Project.

MR O'SHEA: Your Honour, I don't object to the question if this is simply going to Mr Marshall's state of mind, but otherwise, of course, I object.

MR POMERENKE: Of course it is.

…I'm focusing now on this period from May 2002 thereabouts and onwards. You've said that you had seen that clause 5.1, and my question was: Did you have a view as to what were Monto Coal 2 Pty Ltd's obligations regarding the development of Stage 1 of the Monto Coal project?—We were to try as hard as we could to get a mining lease, and we would – we were to develop stage 1 within three years but it would all depend on whether the whole project – that is, stage one and stage two – were seen as being economically viable.

… The expression 'economic liability' that you can see used there in that clause 5.1, did you have an understanding at the time as to what was meant by that expression 'economic viability'?—It meant that the project had to be profitable.

Can I ask you another slightly abstract question about the clause. Do you see there that it says that: *Regard is to be had to the economic viability of the Monto Coal Project.* My question is did you have an understanding as to the point of view from which the economic viability of the Monto Coal

[20] Exhibit WJT-4 to the affidavit of Wylie Jane Thorpe filed 23 May 2019, page 59.

> project was to be assessed?-- … My understanding would be that the Monto Coal project would need to be viable, which meant that it would need to be viable for all the joint venturers as a whole.
>
> So, in your mind, when assessing the economic viability of the Monto Coal project, was there any distinction as between the individual participants?— Not from the point of view of the joint venture.
>
> … [B]efore I finish on the joint venture agreement … I should have asked you one more question. Do you see the clause refers to: … *having regard to all relevant factors relating to the Monto Coal Project and the economic viability of the Monto Coal Project.*
>
> Do you see that?—Yes.
>
> I wanted to ask you about the first part of the phrase: …*having regard to all relevant factors relating to the Monto Coal Project.* Did you have an understanding as to what would comprise all relevant factors within the meaning of that provision?-- I believed that it included all the processes from the mining of coal to the actual selling of the coal and obtaining the sales proceeds."

[24] The plaintiffs submit that the case being advanced by the defendants at trial, as is evident from the above transcript extracts, centres on the subjective beliefs of witnesses that until the Monto Coal Project was economically viable, there was no obligation upon the parties to the Joint Venture Agreement to proceed to establish Stage 1. The plaintiffs also refer to the summaries of evidence provided by the defendants which reveal that similar evidence will be sought to be elicited from other witnesses.[21]

[25] While these transcript extracts show that witnesses such as Mr Wallin and Mr Marshall were questioned as to their state of mind, I note that none of the questions asked by Senior Counsel expressly sought to establish any reliance on legal advice as informing the witness's state of mind.

[26] The plaintiffs submit that the defendants have put their state of mind in issue both on the pleadings and in their conduct of the case, being a state of mind concerning the content of the defendants' rights and obligations, or matters in respect of which legal advice would ordinarily be important and it would be unfair for the defendants to plead and prosecute that case without laying open to scrutiny legal advice that bears upon that state of mind.[22]

Relevant Legal Principles

[27] The applicable legal principles, with one exception which I discuss below, are not in dispute. Waiver is an intentional act done with knowledge whereby a person abandons

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[21] Transcript of Proceedings, 27 May 2019, T1-6, lines 13-26.

[22] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 33; Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 2.

a right or privilege by acting in a manner inconsistent with that right or privilege.[23] In determining whether legal professional privilege has been waived, the question is whether the conduct by the person entitled to the benefit of the privilege said to amount to waiver is inconsistent with the maintenance of the privilege.[24] The Court will impute an intention to waive privilege where the actions of the party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.[25] Whether there is such plain inconsistency is to be determined in "the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances."[26] In this sense questions of waiver are matters of fact and degree.[27] Considerations of fairness will inform the Court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality, but it is not a principle of fairness operating at large. As observed in *Mann v Carnell*:[28]

> "What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of confidentiality; not some overriding principle of fairness operating at large."

[28] The party asserting that privilege has been waived bears the onus of establishing the waiver of privilege.[29]

[29] In relation to issue waiver specifically, the defendants submit that the following principles may be derived from the authorities.[30]

> "…
>
> (a) The mere fact that a party puts its state of mind in issue on the pleadings does not give rise to an implied waiver of privilege: *Federal Commissioner of Taxation v* ***Rio Tinto*** *Ltd* (2006) 151 FCR 341 at [65]; *The Queensland Local Government Superannuation Board v* ***Allen*** [2016] QCA 325 at [71] (Burns J, McMurdo P (at [1]) and Philippides JA (at [7]) agreeing).
>
> (b) There will be no waiver of privilege where a party merely joins issue with an allegation made by the opposing party that he, she or it possessed a particular state of mind: *Allen* at [71].

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23 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326, cited in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303 at [30].

24 *Mann v Carnell* (1999) 201 CLR 1 at 13 [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

25 *Mann v Carnell* (1999) 201 CLR 1 at 13 [29], cited in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303 at 315 [30] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

26 *Osland v Secretary to Department of Justice* (2008) 234 CLR 275 at 297 [45] per Gleeson CJ, Gummow, Haydon and Kiefel JJ at 297.

27 *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IBR 442 at 447 [26], cited in *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 at 298-9 [49].

28 (1999) 201 CLR 1 at 13 [29]; see also *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [5] per Philippides JA.

29 *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 at 556 [54].

30 Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 5.

(c) There will be an issue waiver when a party has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence: *Rio Tinto* at [52]; *Arup* at [36]; *Allen* at [7], [71];

(d) But it is not enough to establish a waiver of privilege that the state of mind asserted relates to a legal position and it is likely that a party obtained legal advice in respect of that legal position: ***Ferella*** *v Official Trustee in Bankruptcy* (2010) 188 FCR 68 at [65] ; *Archer Capital 4A Pty Ltd v* ***Sage Group*** *PLC* (No 3) [2013] FCA 1160; 306 ALR 414 at [48] (both cited with approval, *Macquarie Bank Ltd v* ***Arup*** *Pty Ltd* [2016] FCAFC 117 at [28], 36], [37]); and see ***Viterra*** *Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118 at [78]-[79], noting that the 'Undisclosed Matters' included questions of contractual performance: [19(a)]);

(e) The ultimate question is whether, as part of the privilege holder's case, an assertion has been made that lays open the privileged communication to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of the privilege: *Allen* at [71]. Put another way, the question is whether it would be unfair in the sense explained by the majority of the High Court in *Mann v Carnell* to permit reliance on legal advice for forensic advantage while at the same time preventing the opposing party from having access to it: *Allen* at [73]."

[30] The principles summarised in paragraphs (a), (b), (c) and (e) of the defendants' written submissions are not in dispute. The principle identified in paragraph (d) is, however, in dispute.

[31] The plaintiffs rely on the decision of Bond J in *Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors*.[31] That case concerned a waiver deed which had been executed by one rather than two directors. Oceltip mounted a case that the waiver deed was signed without the knowledge or consent of the other director. Noble pleaded that Oceltip was estopped from contending that the waiver deed was not binding on it. The estoppel was based on both the conduct and representations made by Oceltip, which represented to Noble that the waiver deed was validly executed. Noble pleaded that in reliance upon the representation, it believed "the waiver deed to be validly executed and effective to bind Oceltip". Bond J identified that critical to the estoppel plea was the allegation that Noble had a belief that the waiver deed had been validly executed and effective to bind Oceltip.[32] His Honour cited the principles from *Macquarie Bank Limited v Arup Pty Limited*.[33] Bond J considered it notable that the Full Court of the Federal Court in *Arup* acknowledged "the possibility that a party might make an implied assertion, or bring a case, which necessarily lays open a confidential communication to scrutiny, and by such

[31] [2018] QSC 317.

[32] *Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors* [2018] QSC 317 at [6].

[33] [2016] FCAFC 117 at [29]-[33].

conduct, an inconsistency might arise between that act and the maintenance of the confidence informed partly by the forensic unfairness of allowing the claim to proceed without disclosure."[34] His Honour identified the primary considerations as follows: [35]

> "All the considerations mentioned by Oceltip are relevant, but the ones that strike me as most persuasive of the correctness of the conclusion that Noble should be taken impliedly to have asserted something about the content of its privileged communication, are twofold. First, it is that the state of mind put in issue is a state of mind about a legal conclusion, that is, that a particular circumstance gave rise to a validly executed and effective waiver deed. Second, it is the inferences that I would draw as to whether it was likely that there were confidential communications likely to have affected that state of mind. That does seem to me to turn on evaluating the role of Noble's legal advisors, in a factual sense, in relation to the chronology."

[32] Having considered certain facts set out in a chronology, his Honour concluded that it was very unlikely that legal advice would not have been taken from external legal advisors in respect of the issue. His Honour then made the following observation:[36]

> "But even if that is not so, even if that specific inference is not true, I am prepared to conclude that it is likely that during the relevant period there were confidential communications with its legal advisors that are likely to have affected the state of mind that Noble asserts that it had.
>
> Accordingly, I think that Oceltip has established there has been an implied waiver of privilege in the way for which it contends."

[33] Mr Sheahan QC submits that this observation is difficult to reconcile with intermediate appellate court judgments. I further consider *Oceltip* below in the context of the estoppel issue. In any event, *Oceltip* is, in my view, readily distinguishable from the present case. The relevant authorities establish that an implied waiver of privilege will not occur merely where the state of mind asserted relates to a legal position and it is likely that a party obtained legal advice concerning that position. Whether there is an implied waiver will vary according to the circumstances of each case and, in particular, the specific state of mind that is being asserted and the nature of the legal position to which the state of mind relates. This is evident from *Commissioner of Taxation v Rio Tinto Ltd*[37] (***Rio***), which the defendants relied upon in support of the principle.[38] The case concerned an appeal from an objection decision. Rio requested the Commissioner to provide the "usual particulars of all matters, things, circumstances or events" taken into consideration by the relevant decision-maker in reaching the conclusion that dividend payments made to Rio arose out of dividend stripping. In response, the Commissioner identified a schedule of documents. The Commissioner subsequently refused to disclose several of the documents in the schedule on the ground of legal professional privilege. Rio claimed that privilege had been impliedly waived by the Commissioner's response to Rio's request for particulars. The Full Court of the Federal Court noted that "[m]odern discussions on issue waiver usually commence with the

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[34] *Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors* [2018] QSC 317 at [13].
[35] *Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors* [2018] QSC 317 at [21].
[36] *Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors* [2018] QSC 317 at [24]-[25].
[37] (2006) 151 FCR 341.
[38] Transcript of Proceedings, 27 May 2019, T1-24, lines 1-46, T1-25, lines 1-41.

decision of the Full Court of the Supreme Court of New South Wales in *Thomason v Campbelltown Municipal Council"*.[39] That case concerned undue influence. After quoting the well-known passage of Jordan CJ (at 358-359), the Court stated:[40]

> "As Jordan CJ remarked, in undue influence cases, the plaintiff necessarily puts in issue his or her own state of mind. An allegation of undue influence on the plaintiff's mind may be met by evidence that the plaintiff received advice from an independent third party, as for example, a legal adviser. By bringing the suit, the plaintiff brings the matter of influence before the Court (and into the public domain). If he or she received relevant legal advice, the Court would be required to assess the degree of the alleged influence on the plaintiff and the countervailing effect of the advice."

[34] There is nothing surprising about the proposition that a party, in bringing an undue influence case, may impliedly waive privilege in respect of legal advice. The Court noted that the Commissioner, in raising "an issue in the substantive proceeding as to his states of mind would not provide a proper basis for 'issue waiver'… Further, in exposing his states of mind and the basis for it, the Commissioner would not ordinarily act in a manner inconsistent with the maintenance of privilege over legal advice relevant to his attaining a state of satisfaction or exercising his discretion in a particular way."[41] The Court continued as follows:[42]

> "By his answers to Rio's request, the Commissioner disclosed that the eight privileged scheduled documents were relevant to reaching his state of satisfaction and exercising his discretions. Although the validity of his state of satisfaction and the exercise of his discretion are key issues in the substantive proceeding, as indicated earlier, the mere acknowledgment of the relevance of privileged documents to the key issues does not amount to an act inconsistent with the maintenance of privilege."

[35] The Court ultimately determined that privilege had been impliedly waived by the Commissioner. This was not because the advice was relevant to the Commissioner reaching his state of satisfaction or the exercise of his discretions, but rather because the Commissioner went beyond making an assertion about the relevance of the communications. Rather, the Commissioner had said that he took into account the matters evidenced by the numerous documents, including the eight privileged documents in the schedule. The Court therefore found:[43]

> "In so doing, the Commissioner has made an assertion that puts the contents of these eight documents in issue, or necessarily lays them open to scrutiny, with the consequence that there is an inconsistency between the making of the assertion and the maintenance of the privilege."

[36] As is apparent from *Rio,* the mere fact that legal advices are relevant to an issue in the case including a person's state of mind, does not amount to implied waiver.[44] To

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39 (1939) 39 SR(NSW) 347.
40 (2006) 151 FCR 341 at 355 [49].
41 (2006) 151 FCR 341 at 360-1 [65] and [67].
42 (2006) 151 FCR 341 at 362 [71].
43 (2006) 151 FCR 341 at 362 [72].
44 Transcript of Proceedings, 27 May 2019, T1-25, lines 39-41.

similar effect are the observations by the Full Court of the Federal Court in *Macquarie Bank Limited v Arup Pty Limited*:[45]

> "The correct approach was succinctly described by Yates J in *Ferella & Anor v Official Trustee in Bankruptcy* (2010) 188 FCR 68 at [65] in the following terms:
>
> > '… However the question is not simply whether the holder of the privilege has put that person's state of mind in issue but whether that person has directly or indirectly put the contents of the otherwise privileged communications in issue: see [*Rio Tinto*] at [65].
> >
> > Indeed, even the fact that the holder of the privilege makes clear that the advice was relevant or contributed to a particular course of conduct would not be sufficient to waive the privilege unless, possibly, the contents of the legal advice (and not merely the fact of the advice) are specifically put in issue by relying on the contents of the advice to vindicate a claimed state of mind: [*Rio Tinto*] at [67].'"

[37] Mr O'Sullivan QC for the plaintiffs relied on the reference in *Arup* to the decision of the New South Wales Court of Appeal in *Council of the New South Wales Bar Association v Archer*.[46] This passage from *Archer* was quoted by Bond J in *Oceltip* at [11]. The relevant passage from *Archer* is as follows: [47]

> "It is not enough to bring about a waiver of client legal privilege that the client is bringing proceedings in which the content of the privileged communications could, as a reasonable possibility, be relevant and of assistance to the other party. For the client to do this is not inconsistent with the maintenance of the privilege, and does not give rise to unfairness of the type in question. What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege. In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential communications likely to have affected that state of mind."

[38] The passage emphasised by the Court in *Arup* of Hodgson's JA's judgment in *Archer* was considered by Wigney J in *Archer Capital 4A Pty Ltd v Sage Group Plc (No 3)*[48] where his Honour noted as follows:

> "Four observations can, however, be made about this sentence in Hodgson JA's judgment in *Archer.* First, Hodgson JA used the word 'may', not 'will'. His Honour was not suggesting that all cases where assertions are made about a client's state of mind in circumstances where privileged

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[45] [2016] FCAFC 117 at [28].
[46] (2008) 72 NSWLR 236.
[47] (2008) 72 NSWLR 236 at 252 [48] per Hodgson JA, Campbell JA agreeing. This emphasis was added by the Full Federal Court in *Arup* [2016] FCAFC 117 at [32].
[48] (2013) 306 ALR 414 at 419 [15].

documents are likely to have affected that state of mind will give rise to an implied waiver. Second, this is supported by the fact that, as pointed out by the Full Court in *Rio Tinto,* each matter will turn on its own facts and not much is to be gained by reference to other implied waiver cases unless they arise out of similar facts. Third, the facts and circumstances in both *Archer* and *Cooper* were significantly different to the facts of this case; and fourth, generalisations about types of cases, including cases where a party puts its state of mind in issue, should not distract from the primary question."

[39] An example of an implied waiver case that turned on its own facts is one referred to by the Court in *Arup,* namely *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd*[49] where the Victorian Court of Appeal found an implied waiver of privilege. As explained in *Arup* at [38] to [40] and in *Viterra Malt Pty Ltd v Cargill Australia Ltd*,[50] *Vic Hotel* was an unusual case. As explained by the Court in *Arup*:[51]

> "In *Vic Hotel*, DC Payments relied on evidence of Next Payments' state of mind, acquired by senior managers through communications between them and DC Payments, to prove its case. At the same time, DC Payments denied, by the assertion of legal privilege, the opportunity for Next Payments to prove its lack of the alleged state of mind acquired by the same senior managers in the same way: *Vic Hotel* at [58]. The allegations made by DC Payments align with the type of inconsistent conduct foreshadowed by the majority in *Mann v Carnell*. Similar to proceedings for professional negligence against that party's lawyer, DC Payments could not 'pick and choose, disclosing such incidents of the relationship as strengthen [its] claim for damages and concealing them from forensic scrutiny such incidents as weaken it': *Paragon Finance Plc v Freshfields* [1999] EWCA Civ 955; [1999] 1 WLR 1183, as cited in *Vic Hotel* at [51]."

[40] Mr Sheahan QC also referred to *Insurance Commission of Western Australia v Woodings*.[52] This is a recent decision at first instance which involved an estoppel pleading. The two corporate applicants applied under the *Corporations Act* 2001 (Cth) to reverse the decision of Mr Woodings as liquidator of The Bell Group Ltd. The proof of debt that was subject to the applications was a debt admitted to be owed by The Bell Group Ltd to one of the corporate applicants. The proof of debt had previously been admitted to proof in full in the winding up by a previous joint liquidator. Mr Woodings, upon the resignation of the previous joint liquidator, gave notice to the corporate applicants that he was minded to reject the proof of debt in its entirety. The applicants sought orders reversing the decision of Mr Woodings and restraining him from revoking the decision to admit the proof of debt. One of the corporate applicants also pleaded that Mr Woodings was estopped from re-adjudicating, rejecting or amending the proof of debt. The corporate applicants referred to the fact that they had taken steps and made particular decisions "in reliance on a belief, opinion or assumption that Mr Woodings was of the view that the proof of debt was properly admitted by [the previous liquidator] and that the claim underlying the proof of debt was valid".[53] The estoppel alleged was

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49 (2015) 321 ALR 191.
50 [2018] VSCA 118 at [81].
51 [2016] FCAFC 117 at [40].
52 [2018] WASC 249.
53 [2018] WASC 249 at [19].

based on the "conventional basis of relationship and by representations" of both the previous liquidator and Mr Woodings.[54] In dismissing Mr Woodings' application for inspection and determining that the corporate applicants had not impliedly waived legal professional privilege, Smith J observed:[55]

> "Whether disclosure of legal advice is inconsistent with maintaining confidentiality will not only depend upon the circumstances of a case but, and of particular importance in the determination of these applications in this matter, questions of waiver are matters of fact and degree.
>
> An opinion, belief or assumption that the veracity of the proof of debt had been settled and would not be reexamined is a belief, opinion or assumption pleaded by both ICWA and JNTH which is said to arise as a result of representations and conduct of both liquidators of TBGL and is not pleaded by either ICWA or JNTH as an opinion, belief or assumption formed on the basis of any advice or lack of advice from legal advisors. Nor is the opinion, belief or assumption in either case pleaded to have been formed to be connected to, in any way by the provision of legal advice or through privileged communications.
>
> Thus, it cannot be said that the question of reliance on the belief, opinion or assumption as pleaded must have been informed or addressed by legal advice that either ICWA or JNTH received.
>
> Whilst it may be accepted that the pleaded cases by ICWA and JNTH put in issue their state of mind at the time they each relied on the conduct of Mr Totterdell and Mr Woodings, the acts and decisions they plead as acts taken in reliance of the belief, opinion or assumption importantly do not rely upon an understanding of the legal effect of their opinion, belief or assumption that the liquidators would not at any time after 1996 call into question the proof of debt. Nor does it appear from the pleadings that ICWA or JNTH have received any legal advice that affected the formation of this opinion, belief or assumption at any material time." [citations omitted]

[41] Mr Sheahan QC in particular relied on paragraphs [76] and [78] of the decision of Smith J:

> "The fact that ICWA and JNTH plead that they took, or did not take, particular steps in relation to which they received legal advice that they would not have taken, or would have taken, had they not formed the erroneous opinion, belief or assumption does not elevate any legal advice they may have received about the steps that they subsequently took, or did not take, to be an issue of the kind which results in a waiver of the privilege. In particular, legal advice is not relied upon or impliedly or expressly pleaded to play any part to support the claimed state of mind by either ICWA or JNTH about the intentions of Mr Totterdell or Mr Woodings in respect of the proof of debt.
>
> …

[54] [2018] WASC 249 at [20].
[55] [2018] WASC 249 at [69]-[72].

> Just because subsequent action undertaken by ICWA and JNTH on reliance are pleaded and legal advice was given (or was likely to have been given) as to whether such steps should or should not be taken at the relevant time, does not elevate the legal advice to be an issue of a particular character that establishes reliance by ICWA or JNTH on the representations made by the liquidators of TBGL."

[42] Mr O'Sullivan QC sought to distinguish *Woodings* on the basis that although it concerned a case of estoppel by convention, the subject matter of the estoppel was not the meaning of an agreement (the present case) or whether a deed was binding (*Oceltip*), but only concerned an estoppel based on a factual question.[56] As such, Mr O'Sullivan submits that *Woodings* does not cast doubt on the correctness of Bond J's decision in *Oceltip.* The decision of Smith J is, in my view, of assistance. Like the present case, there was no express reliance on legal advice as informing the common assumption. In the present case, that common assumption is pleaded by reference to seven Management Committee Meetings and one other meeting. To seek to distinguish *Woodings* on the basis that the common assumption was factual rather than legal depends on how one characterises the pleaded estoppel by convention in the present case. From the paragraphs of the pleadings set out above, it is evident that the proper construction of clause 5.1 of the Joint Venture Agreement will be a matter for the Court to determine.[57] As to the estoppel plea, the common assumption, namely that, until the Monto Coal Project was economically viable there was no obligation upon the parties to proceed to establish Stage 1, may as easily be characterised as a factual rather than a legal assumption as it is pleaded to arise from a course of dealing between the parties. This is to be distinguished from *Oceltip* where the estoppel plea was expressly based on a belief that the waiver deed had been validly executed and was effective to bind Oceltip.

[43] In any event, when paragraph [24] of *Oceltip* is considered in context, Bond J was not, in my view, seeking to state a principle contrary to that identified by the defendants, namely that it is not enough to establish an implied waiver of privilege that the state of mind asserted relates to a legal position and it is likely that a party obtained legal advice in respect of that legal position. Paragraph [24] of *Oceltip* should be understood as an application of the correct principles by Bond J to the particular circumstances of that case. As observed above, whether waiver is to be imputed is a judgment to be made in the context and circumstances of the case. In the circumstances of the present case and applying the above principles, I am not satisfied that the defendants, either by their pleadings or their conduct, have impliedly waived privilege.

(a) The common assumption as to the obligation to develop Stage 1

[44] The plaintiffs submit that paragraph 83A(b) of the defence carries the necessary allegation that Monto Coal 2 had the underlying belief that is pleaded.[58] Paragraph 83A(b), which is set out above,[59] does not in fact plead any relevant belief. Rather it refers to the parties to the Joint Venture Agreement sharing a common assumption

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[56] Transcript of Proceedings, 27 May 2019, T1-37, lines 18-25 and T1-38, lines 37-39.
[57] See [14] above.
[58] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 38.
[59] See [15] above.

which is particularised by reference to what was said at seven Management Committee Meetings and another meeting between representatives of Monto Coal 2 and the plaintiffs. The defendants submit and I accept that the correct characterisation of the defendants' case affects the plaintiffs' reliance on the reasoning in *Oceltip* where the party in question had expressly pleaded its "belief" that a deed had been "validly executed".[60]

[45] Paragraph 83A(b) of the defence forms the basis for an estoppel by convention. The nature of an estoppel by convention was explained by McPherson J (as his Honour then was) in *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd*:[61]

> "… [T]he principle invoked first requires that evidence be identified which establishes the conventional basis for the assumption relied upon. The word 'conventional' in this context carries connotations of agreement, not necessarily express but to be inferred, or at least a demonstrable acceptance of a particular state of things, as a foundation for the dealings of the parties. There must, as the passage from Lord Denning's judgment acknowledges, be at least a 'course of dealing between the parties'; that is to say acts or conduct which impinge upon what his Lordship describes as 'their mutual affairs'. Acts done privately by one party without coming to the knowledge of the other can scarcely be capable of forming a conventional or accepted basis governing their relations. To produce that consequence the acts or conduct relied upon must point plainly, if not unequivocally, to the assumption put forward as the conventional basis of relations."

[46] Understood in these terms, paragraph 83A(b) is not concerned with the state of mind of Monto Coal 2 as to the scope of the contractual rights and obligations imposed by the Joint Venture Agreement, particularly clause 5.1. Rather, the plea raises issues concerning whether the parties have engaged in a course of dealing which would prevent the plaintiffs from insisting upon the "strict literal terms"[62] of the Joint Venture Agreement and in particular clause 5.1. I accept the defendants' submission that they have not put in issue the state of mind of Monto Coal 2 concerning its actual legal rights and obligations. Nor do the defendants make an assertion which lays open any privileged communication to scrutiny.[63]

[47] I do not accept that the defendants' state of mind as to the common assumption is likely to have been affected by the content of the legal advice provided to the defendants at the relevant time.[64] That conclusion, according to the plaintiffs, primarily arises from three matters, namely the Category 2 documents, the defendants' list of privileged documents and a letter dated 20 May 2003 from McCullough Robertson to Robert Adams (an officer of the defendants and a principal witness yet to be called, identifying the work undertaken by the firm in connection with briefing Mr Boyd).[65] The difficulty with this submission is that the pleading of estoppel by convention in paragraph 83A(b) does not

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[60] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 11.

[61] [1989] 2 Qd R 40 at 46.

[62] *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 46 (McPherson J).

[63] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 12(b).

[64] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 44.

[65] Affidavit of Toby Michael Boys filed 22 May 2019.

rely on the receipt by the defendants of legal advice which in any way informed the common assumption. Further, as correctly submitted by the defendants, even if there is an objective likelihood that Monto Coal 2's state of mind could have been informed by legal advice, mere likelihood is not sufficient to result in an implied waiver of privilege in advice which could have informed that state of mind.[66]

[48] Finally, the fact that the defendants' list of privileged documents reveals the defendants possess numerous documents recording legal advice simply constitutes an acknowledgment by the defendants that those advices are relevant. As observed by Wigney J in *Sage*:[67]

> "However, relevance to an issue is not the proper test for implied waiver. More is involved in the assessment of issue or implied waiver than merely putting state of mind in issue, even if that state of mind involves a belief, opinion or assumption concerning the law. The ASOC does not refer in any way to legal advice or any privileged communication, let alone the contents of any such communication. The applicants do not plead in any way that their beliefs, opinions or assumptions were influenced in any way by legal advice. The pleadings make no direct reference to the involvement of the applicants' lawyers. In these circumstances it is not possible to conclude that by their pleadings alone the applicants have expressly or impliedly made an assertion about a privileged communication, or otherwise necessarily laid open to scrutiny any confidential communication."

(b) Reliance

[49] Paragraph 83A(d) of the defence pleads the defendants' reliance upon the common assumptions and representations. The plaintiffs submit that this allegation of reliance "extends the defendants' pleaded case about their state of mind (by asserting how it affected their conduct), and carries as well an assertion that the reliance was reasonable".[68] It follows from my finding that paragraph 83A(b) of the defence does not result in a waiver of legal professional privilege that the same conclusion must be reached in respect of paragraph 83A(d). Further, as stated by the Court of Appeal of the Supreme Court of Victoria in *Viterra*, "a pleading of reliance, without more, will not usually manifest inconsistency with the maintenance of client legal privilege in communications relevant to that state of mind."[69]

(c) Monto Coal 2 acted in good faith and reasonably

[50] I have set out above paragraphs 129B, 129C, 129D and 156E of the defence.[70] The plaintiffs submit that legal advice bearing upon the decision to take no step to complete Stage 1 by May 2005 would tend to directly affect whether the intention was formed in

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[66] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 12(c) citing *Archer Capital 4A Pty Ltd v Sage Group Plc (No 3)* (2013) 306 ALR 414 at 428 [48].

[67] *Archer Capital 4A Pty Ltd v Sage Group Plc (No 3)* (2013) 306 ALR 414 at 428 [48].

[68] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 38(b).

[69] *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118 at [73].

[70] See [17] above.

"good faith" and "reasonably" as alleged.[71] Neither these paragraphs of the defence nor the conduct of the trial to date gives rise to an implied waiver of privilege. In the relevant paragraphs of the defence, the defendants identify matters which they had regard to for the purposes of forming the view that the Monto Coal Project was not economically viable. It is by reference to these matters that the defendants assert that they acted in good faith in accordance with the requirements of clause 4.1(f) and reasonably in accordance with the requirement in clause 5.1 of the Joint Venture Agreement. The pleaded matters include the economic viability of the Monto Coal Project and what is referred to in the pleading as "all relevant factors". None of these relevant factors involve any assertion or reliance as to Monto Coal 2's state of mind concerning the content and scope of its legal rights and obligations. I accept the defendants' submission that the plea that Monto Coal 2 formed a view, and held an intention, in good faith and reasonably is not a plea about Monto Coal 2's contemporaneous state of mind regarding its legal rights and obligations. It is a legal conclusion which the defendants are now asking the Court to apply to the conduct of Monto Coal 2.[72]

[51] As to the conduct of the case by the defendants to date, Mr Sheahan QC in oral argument explained why the questions identified above were asked:[73]

> "In any event, our learned friends point to some evidence about belief. Belief, in relation to the estoppel by convention case, does arise in an evidentiary way, which is why I was cross-examining Mr Wallin about it. The evidence that came from our witnesses, and is coming, and will continue to come from our witnesses about belief, is principally directed to the case of bad faith pleaded by the plaintiff against the defendants; the decisions that were made, were made for improper purposes – knowingly improper purposes – directed to achieve pecuniary gains for my clients and in a conscious departure from the requirements of the contract, in bad faith. And so, in those circumstances, each of the witnesses for the defendants will be asked – they will have put to them, in effect, the case that's raised against us, and they'll be asked to comment. And part of that case is the case about their understanding of what their obligations were as joint venturers in this context."

[52] The relevant exchanges identified by the plaintiffs are therefore explicable by the defendants seeking to meet a case of bad faith pleaded by the plaintiffs. Such conduct does not give rise to an implied waiver of privilege. The conduct of the defendants as evidenced by the relevant exchanges is not conduct which is inconsistent with the maintenance of privilege. This is particularly so in circumstances where the defendants' pleaded case in terms of acting in good faith and reasonably is not pleaded as being informed by legal advice.

(d) The claim against Macarthur Coal for inducing a breach of contract

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71 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 38(d).
72 Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 18(b).
73 Transcript of Proceedings, 27 May 2019, T1-21, line 45 to T1-22, line 9.

[53] The effect of paragraphs 29 and 30 of the statement of claim and paragraph 187 of the defence are set out above.[74] Paragraph 30 of the statement of claim pleads that Macarthur Coal induced Monto Coal 2 to breach the Joint Venture Agreement and did so intentionally, knowing that the consequences of it causing Monto Coal 2 to do so would cause it to act in breach of its contractual obligations. The plaintiffs submit that Macarthur Coal's pleaded denial in paragraph 187 of the defence is founded upon two pillars. First, there is repetition of pleaded responses to, inter alia*,* paragraphs 11, 21, 22 and 29 of the statement of claim. Second, paragraph 187(b)(v) pleads as a reason for denial, the pleading to paragraph 29 of the statement of claim, which is paragraph 186 of the defence. The net effect, according to the plaintiffs, is that Macarthur Coal asserts as reasons for it not believing that the pleaded conduct of Monto Coal 2 was a breach of contract, inter alia*:*

(a) that the parties had the belief about their obligation to develop Stage 1 of the Monto Coal Project pleaded in paragraph 83A(b) of the defence (viz. that they believed that there was no obligation to establish Stage 1 until the Project was economically viable);

(b) that Mr Adams acted in good faith and reasonably when voting to suspend the Project in July 2003 – which carries the necessary implication that Mr Adams did not receive legal advice casting doubt upon the propriety of that conduct, or whether it did or might contravene the Joint Venture Agreement;

(c) an allegation that Monto Coal 2 has not caused the Project to be progressed since July 2003 in good faith and reasonably in accordance with the requirements of the Joint Venture Agreement – which carries the necessary implication that Monto Coal 2 has not received legal advice casting doubt upon the propriety of that conduct, or whether it did might contravene the Joint Venture Agreement; and

(d) the construction of clause 5.1 alleged in paragraph 83 of the defence is correct, and the construction of that clause in paragraph 11 of the statement of claim is wrong, which carries the necessary implication that Macarthur Coal believed that the construction of clause 5.1 alleged in the defence was correct.[75]

[54] The plaintiffs therefore submit that Macarthur Coal has pleaded a case about its state of mind, and in a manner that effects an implied waiver of privilege in respect of legal advice relevant to that state of mind.[76] The plaintiffs further submit that it would be substantially unfair to permit the defendants to advance the pleaded case on the one hand, but not permit the plaintiffs to cross-examine on the content of legal advice the defendants received concerning clause 5.1 of the Joint Venture Agreement.[77]

[55] The defendants accept that the plaintiffs have put in issue Macarthur Coal's knowledge of (inter alia) the proper construction of the Joint Venture Agreement (pleaded in paragraph 11 of the statement of claim), and whether the conduct of Monto Coal 2 was in breach of the Joint Venture Agreement (pleaded in paragraph 27 of the statement of claim).[78] The defendants submit however, that the mere fact that Macarthur Coal's state of mind is in issue on the pleadings does not give rise to an implied waiver of privilege

74 See [19] above.
75 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 39.
76 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 40.
77 Transcript of Proceedings, 27 May 2019, T1-7, lines 5-12.
78 See paragraph 29 of the Second Further Amended Consolidated Statement of Claim filed 21 May 2019.

in any legal advice that could have informed that state of mind. As discussed above, this may be accepted as a correct proposition of law.

[56] Macarthur Coal has not, in my view, pleaded a case about its state of mind, and in a manner that effects an implied waiver of legal advice relevant to that state of mind. Paragraph 187 of the defence merely joins issue with the allegations of knowledge relied upon by the plaintiffs. I accept the defendants' characterisation of the pleaded paragraphs of the defence:

> "… the defendants' response to the plaintiffs' allegations of knowledge is limited to:
>
> (i) denying the truth of the matters relied upon [by] the plaintiffs;[79]
>
> (ii) denying that the alleged knowledge can be inferred from facts relied upon by the plaintiffs;[80] and
>
> (iii) denying that Macarthur Coal held the knowledge alleged by the plaintiffs, without going further and pleading a positive case about Macarthur Coal's state of mind.[81]"[82]

[57] I also accept the defendants' submission that there is nothing in the defence which makes an assertion as to the content of legal advice. Nor is there anything in the defence which alleges that any individual on behalf of Macarthur Coal:

(i) had formed any state of mind as to whether the alleged contravening conduct was or would be a breach of the Joint Venture Agreement;

(ii) had obtained legal advice about whether the allegedly contravening conduct was or would be a breach of the Joint Venture Agreement;

(iii) had formed any state of mind having regard to legal advice about whether the allegedly contravening conduct was or would be a breach of the Joint Venture Agreement.[83]

[58] In circumstances where the defendants have merely joined issue with the plaintiffs' allegations of knowledge and intention and do not themselves rely on any legal advice in denying such knowledge or intention, such a pleaded case is not plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.

The Second Issue

[59] On 31 July 2017, the defendants disclosed, in an unredacted form, a note dated 7 April 2003 prepared by Shane Stephan, an employee of Macarthur Coal and emailed to Bob

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[79] In respect of paragraph 11 of the Second Further Amended Consolidated Statement of Claim filed 21 May 2019, see the response in paragraphs 83 and 84-86 of the Fifth Further Amended Defence filed 21 May 2019. In respect of paragraph 27 of the Second Further Amended Consolidated Statement of Claim filed 21 May 2019, see the response in paragraphs 169-184 of the Fifth Further Amended Defence filed 21 May 2019.

[80] Fifth Further Amended Defence filed 21 May 2019, paragraph 186(k).

[81] Fifth Further Amended Defence filed 21 May 2019, paragraphs 186(aa)-(g) and 187(b)(v).

[82] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 22(b).

[83] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 22(d).

Adams, another employee.[84] The note is 10 pages long. The final page of the note has a heading titled "Summary of Legal Advise [sic] from Bill Boyd" followed by a summary of Mr Boyd's advice (**the summary**).[85]

[60] In order to determine whether the defendants have waived privilege in relation to the Category 2 documents, it is necessary to refer to the chronology of events both before and after 31 July 2017.

[61] The defendants' present solicitors, Allens, were engaged in December 2015. Prior to their engagement, disclosure had primarily been undertaken by two other firms of solicitors which had previously acted for the defendants, namely Corrs Chambers Westgarth from 2007 to 2014 and Johnson Winter and Slattery in 2015.[86] Both Corrs Chambers Westgarth and Johnson Winter and Slattery had previously disclosed duplicates or near duplicate documents of the 10 page note dated 7 April 2003. This had occurred approximately six times prior to 31 July 2017. In each instance, page 10 of the note, which contained the summary, had been redacted with an accompanying note asserting legal professional privilege.[87]

[62] In about mid-2017, Ms Morrison, a solicitor with Allens, formed the view that there were further documents which the defendants would need to disclose to the plaintiffs in the proceeding.[88] Ms Morrison had supervision of the review of these potential further documents for the purpose of disclosure, including the identification of any content which was the subject of a claim for legal professional privilege.[89] As is apparent from Ms Morrison's affidavit and in particular paragraphs 4 to 8, the summary was inadvertently disclosed as it was mistakenly marked as a disclosable rather than a privileged document. On 31 July 2017, approximately 1,200 documents were provided by the defendants to the plaintiffs by way of a USB stick. These 1,200 documents inadvertently included, for the first time, page 10 of the note dated 7 April 2003, being the summary, in unredacted form. [90] The plaintiffs accept that the initial disclosure of the summary by the defendants on 31 July 2017 was inadvertent.[91]

[63] On 20 April 2018, the defendants filed and served the plaintiffs with the summary of evidence of Robert Adams. While the note dated 7 April 2003 is referred to, the summary of evidence does not refer to the summary.[92] Mr Adams has not yet been called as a witness in the proceeding, nor has his summary been tendered. Further, it may be accepted that the inadvertent disclosure of the summary had not been identified by the solicitors for the defendants when Mr Adams' summary of evidence was compiled and provided.[93]

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84 MAC.101.089.2555.
85 Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 24.
86 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraphs 1-2.
87 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 11.
88 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 3.
89 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 3.
90 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 8.
91 Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 75.
92 Exhibit TMB-3 to the affidavit of Toby Michael Boys filed 22 May 2019, page 37.
93 Affidavit of Toby Michael Boys filed 22 May 2019, paragraph 6; affidavit of Robyn Lesleigh Morrison, filed 22 May 2019, paragraph 17(a).

[64] The note dated 7 April 2003 is referred to in paragraph 296 of the plaintiffs' written opening at trial but the summary is not specifically referred to.[94] The note is also referred to in paragraphs 389(i) and 454 of the defendants' written opening, but again the summary is not specifically referred to.[95]

[65] On 9 April 2019, which was day two of the trial, during the oral opening of the plaintiffs' case the following exchange occurred between Bond J and Mr O'Shea QC for the plaintiffs:[96]

> "HIS HONOUR: I see. And there's no – I don't recall anyone opening any legal advice. I take it there's none that has been – privilege just hasn't been waived on any legal advice anyone obtained at that time?
>
> MR O'SHEA: In relation to?
>
> HIS HONOUR: These matters, the proper construction of the JVA or anything like that.
>
> MR O'SHEA: Your Honour, I'm not aware of that sort of legal advice. Would your Honour give me a moment? As my learned junior says, your Honour, it would be possible to defend a claim on the basis, 'Well, even if we caused a subsidiary to do something that as in breach, we had an honest and reasonable belief that it wasn't in breach'. And that defence is not pleaded, so it really doesn't make their – as we understand it, in that sense they haven't put their belief in issue.
>
> HIS HONOUR: Right. Thank you.
>
> MR O'SHEA: But that may or may not be the reason for the lack of disclosure of advice, your Honour. In relation to the meaning of 5.1, your Honour.
>
> HIS HONOUR: Yes."

[66] Later that day on 9 April 2019, Mr O'Shea QC took Bond J to the note dated 7 April 2003 but did not expressly address the summary. His Honour did however, note the summary:[97]

> "HIS HONOUR: There's a reference to summarising a legal advice, if you look at this, page 10."

Mr O'Shea replied to the effect this was correct and moved on in his address.

[67] On 15 April 2019, which was the fifth day of trial, the plaintiffs tendered the documents contained in the plaintiffs' written opening, which included the unredacted summary.[98] The documents contained in the plaintiffs' written opening were tendered in a document styled "Tender List 1" which, on the seventh day of trial, was marked for

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94 Affidavit of Toby Michael Boys filed 22 May 2019, paragraph 12.
95 Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 17(b) and (c).
96 Affidavit of Toby Michael Boys filed 22 May 2019, page 119.
97 Affidavit of Toby Michael Boys filed 22 May 2019, page 132.
98 Affidavit of Toby Michael Boys filed 22 May 2019, paragraph 15.

identification.[99] On the eighth day of trial Bond J made a ruling in respect to the documents in Tender List 1. That ruling was in the following terms:[100]

> "The documents tendered for all purposes and without any objection were admitted for all purposes. The documents so admitted should have inserted in the tender note field the words: Admitted for all purposes."

[68] On Friday, 17 May 2019, the solicitors for the plaintiffs sent a letter to the solicitors for the defendants asserting, among other matters, that the defendants had waived privilege in respect of the summary and also advices on the same subject matter that might qualify or alter the summary disclosed.[101] The solicitors for the defendants replied by letter dated 20 May 2019 in which they asserted that the defendants wished to claim privilege over the summary and that disclosure without redaction was inadvertent.[102] The letter of 20 May 2019 also noted that no party had referred to the summary in support of its case. The letter continued:[103]

> "The defendants were unaware that page 2564 had been disclosed in unredacted form prior to His Honour's reference to that page in the course of the plaintiffs' oral opening (at T 2-50:25). At that time, there was no discussion of the significance of that page nor any suggestion from the plaintiffs' Counsel that the page constituted a waiver of privilege in respect of other documents."

The solicitors for the defendants sought the plaintiffs' consent to the summary being again redacted and the return, destruction or deletion of all unredacted copies of the summary.

[69] Ms Morrison's evidence is that when she was present in Court on 9 April 2019 when the exchange occurred between Mr O'Shea QC and Bond J, she was not surprised by his Honour mentioning a summary of legal advice.[104] This was because she was aware that many of the documents from the period of 2003 contained legal advice or a summary of legal advice which had been shared among the joint venture participants. She was also aware that Monto Coal 2 in 2003 had shared legal advice it had received from lawyers acting for it (Hogan Besley Boyd) with Mr Wallin. Ms Morrison further affirms in her affidavit that the first time she became aware that the summary had been disclosed was upon her review, on Sunday, 19 May 2019, of the letter from the plaintiffs' solicitors dated 17 May 2019.[105] Ms Morrison's evidence is that on no occasion has she been instructed by any of the defendants to waive privilege in the advice from Mr Boyd as set out in the summary.[106]

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[99] Affidavit of Toby Michael Boys filed 22 May 2019, paragraph 16.
[100] Exhibit TMB-10 to the affidavit of Toby Michael Boys filed 22 May 2019, paragraph 17.
[101] Exhibit TMB-11 to the affidavit of Toby Michael Boys filed 22 May 2019.
[102] Exhibit TMB-12 to the affidavit of Toby Michael Boys filed 22 May 2019.
[103] Exhibit TMB-12 to the affidavit of Toby Michael Boys filed 22 May 2019, page 178.
[104] Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 9.
[105] Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 10.
[106] Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 15.

[70] As the plaintiffs accept that the initial disclosure of the summary by the defendants on 31 July 2017 was inadvertent, the question is whether the subsequent conduct of the defendants has waived legal professional privilege in respect of the summary.

[71] The plaintiffs submit that the disclosure of the note without redacting the summary, the reference to this note in Mr Adams' witness summary and in the defendants' written opening, and the defendants' failure to object to its tender establishes a prima facie case of waiver. The plaintiffs further submit that once a prima facie case of waiver is established, the defendants bear the onus of establishing that, notwithstanding their conduct, privilege has not been waived because all of the conduct giving rise to the waiver has been inadvertent, and in a manner that prevents any waiver occurring.[107] The case relied on for this proposition is *Boensch v Pascoe*.[108] In that case Jacobson J observed:

> "Of course, 'a mere plea' of inadvertence may not by itself necessarily enable a party to avoid a waiver of privilege; *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538 at 542-543. Thus, the Court must be satisfied on the material before it that the act was in truth inadvertent."

[72] *Boensch* does not establish the proposition that the defendants bear the onus of establishing the existence of the exculpatory inadvertence. The plaintiffs continue to bear the onus of proving waiver.[109]

[73] Irrespective of which party carries the onus, I am of the view that none of the defendants' conduct subsequent to the inadvertent disclosure of the unredacted summary on 31 July 2017 constitutes a waiver of privilege. The plaintiffs principally rely on the statement in the letter of 20 May 2019 that the defendants were unaware that the summary had been disclosed in an unredacted form until the exchange on 9 April 2019. The plaintiffs submit that the defendants' conduct in permitting the tender of the documents referred to in the plaintiffs' opening, including the unredacted summary, amounts to a waiver of privilege. The letter of 20 May 2019 asserting privilege came 41 days after the exchange between Mr O'Shea QC and Bond J.[110]

[74] In *Expense Reduction v Armstrong*, the High Court stated:[111]

> "The courts will normally only permit an error to be corrected if a party acts promptly. If the party to whom the documents have been disclosed has been placed in a position, as a result of the disclosure, where it would be unfair to order the return of the privileged documents, relief may be refused. However, in taking such considerations (analogous to equitable considerations) into account, no narrow view is likely to be taken of the ability of a party, or the party's lawyers, to put any knowledge gained to one side. That must be so in the conduct of complex litigation unless the documents assume particular importance."

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[107] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 73.
[108] [2007] FCA 532 at [39].
[109] *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 at 556 [54].
[110] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraphs 69-71.
[111] (2013) 250 CLR 303 at 320 [49].

[75] The High Court also referred to the situation where a privileged document is inadvertently disclosed:[112]

> "Although discovery is an inherently intrusive process, it is not intended that it be allowed to affect a person's entitlement to maintain the confidentiality of documents where the law allows. It follows that where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so."

The High Court continued:[113]

> "For present purposes, it is sufficient to observe that, in large commercial cases, mistakes are now more likely to occur. In *Istil Group Inc v Zahoor*,[114] Lawrence Collins J observed that '[t]he combination of the increase in heavy litigation conducted by large teams of lawyers of varying experience and the indiscriminate use of photocopying has increased the risk of privileged documents being disclosed by mistake."

[76] In the present case, it is accepted by the plaintiffs that the disclosure of the unredacted summary on 31 July 2017 was inadvertent. Further, it was not only inadvertent but it was also made in circumstances where duplicate or near duplicate documents had been disclosed on six previous occasions by other solicitors for the defendants with the summary redacted on the grounds of legal professional privilege. Further, the inadvertent disclosure and the subsequent conduct of the defendants should be viewed in the context of what is a large commercial case involving voluminous documents.

[77] The tender of the note which included the unredacted summary was in the context of a bulk tender of all documents referred to in the plaintiffs' written opening. Neither in the written opening nor the plaintiffs' oral opening was any reference made to the summary.

[78] The plaintiffs, in my view, make too much of the letter of 20 May 2019. The letter refers to the fact that there was no discussion of the significance of the summary in the exchange that occurred on 9 April 2019. Further, the evidence of Ms Morrison that she first became aware of the inadvertent disclosure on 19 May 2019 is uncontested. Ms Morrison's evidence was that she was not surprised with Bond J mentioning a summary of legal advice since she was aware that it was not uncommon for there to be references to legal advice in documents prepared in and around 2003. This evidence should also be accepted.

[79] In light of Ms Morrison's evidence, the appropriate finding is that the defendants did not become aware of the inadvertent disclosure of the summary until it was brought to their attention by the plaintiffs' letter of 17 May 2019. The defendants thereafter acted promptly in advising the plaintiffs' solicitors that the disclosure was inadvertent and requesting the destruction or return of the unredacted document. Neither the

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[112] (2013) 250 CLR 303 at 319 [45].
[113] (2013) 250 CLR 303 at 320 [48].
[114] [2003] 2 All ER 252 at 269 [72].

defendants' failure to object to the tender of the note of 7 April 2003 nor the referencing of the document in Mr Adams' summary of evidence prevents such a finding being made. The tender was made on day five of the trial as a bulk tender of 387 documents.[115] As to Mr Adams' summary of evidence as referred to above, Ms Morrison affirms that the inadvertent disclosure of the summary was not identified when Mr Adams' summary of evidence was compiled, which is 59 pages long and refers to 303 documents.[116]

[80] The plaintiffs submit that it would be unfair to permit the position to obtain that Bond J has, by the conduct of the defendants, read and possibly given consideration to legal advice that is arguably of assistance to the defendants' case, without requiring the defendants to lay open to examination the full suite of legal advice that they received on the topic in early 2003.[117] In *Expense Reduction,* the High Court referred to the ability of the parties' lawyers to put any knowledge gained from inadvertent disclosure to one side.[118] Similar considerations apply to the ability of a trial judge to set aside any consideration of a document inadvertently disclosed and tendered. This is particularly so in the context of large commercial litigation involving voluminous documents. I further note that no party has sought to deploy the summary in the conduct of the trial. Mr Adams is yet to be called as a witness and his summary of evidence has not been tendered. In any event, his summary of evidence does not refer to the summary. While the plaintiffs and the defendants refer to the note dated 7 April 2003 in their written openings, neither make specific reference to the summary.

[81] As I have found that the defendants' conduct has not waived privilege, it follows that the relief sought by the defendants in their application filed 22 May 2019 ought to be granted. As observed by the High Court in *Expense Reduction*,[119] "where a privileged document is inadvertently disclosed, the [C]ourt should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so." Such a request has been made in the present case and the plaintiffs have declined to consent to this course of action.

The Third Issue

[82] On or about 9 October 2007, Ms Frost and Mr Kimmins, a partner at Corrs Chambers Westgarth, met with Mr Ken Talbot. One of the purposes of the meeting was to obtain Mr Talbot's instructions on the matters alleged in the statement of claim so that a defence could be prepared. Ms Frost took a file note of what was said at that meeting.[120] The defendants have disclosed a redacted version of that file note. The plaintiffs seek disclosure of the file note in its entirety.

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[115] Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 17(d).
[116] Affidavit of Robyn Lesleigh Morrison filed 22 May 2019, paragraph 17(a).
[117] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 76(a).
[118] (2013) 250 CLR 303 at 320 [49].
[119] (2013) 250 CLR 303 at 319 [45].
[120] Affidavit of Corin Eileen Morcom filed 22 May 2019, paragraph 5.

[83] As observed above, the parties are content for the Court to examine the file note. The plaintiffs have identified the relevant legal principles to be applied in such an examination:[121]

> "In *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, Templeman LJ (at 536) observed that ordinarily privilege cannot be maintained in part only of a document unless the document is capable of being divided into separate parts dealing with separate subject matter.
>
> However, In *MAM Mortgages Limited (in liq) v Cameron Bros. (No. 2)* [2001] 1 Qd R 46, Wilson J explained that Templeman LJ's test was too inflexible. Her Honour preferred a test which asks whether, as a matter of fairness, waiver of one part of the document meant that the remainder of the document must be produced (at 48-49). Her Honour adopted comments by Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, who said (at 488):
>
> > 'In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject-matter.'
>
> A similar approach was adopted by Tobias JA (Allsop P and Hodgson JA agreeing) in *Bailey v Director-General, Department of Land and Water Conservation* (2009) 74 NSWLR 333 (at [130]).
>
> More recently, upon surveying the authorities, including *Mann v Carnell* (1999) 201 CLR 1, in *Alstom Power v Yokogawa Australia Pty Ltd (No 5)* [2010] SASC 267; (2010) 272 LSJS 1, Bleby J suggested that (at [29]):
>
> > '… the statement that either privilege is claimed with respect to the whole or waived as to the whole document cannot be read in isolation. In my opinion it can only apply where there is inconsistency or unfairness in the sense discussed by the High Court in waiving privilege as to only part of the document. It is not merely a matter of ascertaining whether the document concerned deals with separate subject matters.'" [footnotes omitted]

[84] The plaintiffs submit that applying the test of inconsistency of conduct, the file note must be disclosed in full. It is inconsistent with the maintenance of privilege for a party to seek the advantage of only a part of a document in assisting it to mount its case.[122] The defendants assert that disclosure was made for the limited purpose of responding to factual allegations made by the plaintiffs in circumstances where the file note is the best evidence available to the defendants. The substance of any legal advice is not disclosed.[123]

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[121] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraphs 94-97.
[122] Outline of Submissions for the Plaintiffs filed 23 May 2019, paragraph 99.
[123] Defendants' Submissions: Privilege Application filed 24 May 2019, paragraph 42.

[85] Having considered the redacted parts of the file note, those parts would not cause the plaintiffs to be misled by an inaccurate perception of the unredacted parts. No unfairness, in my view, arises from the waiver of privilege as to only part of the file note.

Disposition

[86] I make the following orders:

1. The plaintiffs' application filed 20 May 2019 is dismissed;

2. Leave is granted to the defendants to amend their List of Documents served 31 July 2017 to mark document MAC.101.089.2555 (**the Document**) as partly privileged pursuant to r 375 of the *Uniform Civil Procedure Rules* 1999 (Qld);

3. With respect to the Document the plaintiffs must, within seven days of the making of this order:

   (a) deliver up all hard copies of the Document in their possession, custody or power to the solicitors for the defendants;

   (b) return any computer disk containing copies of the Document in their possession, custody or power to the solicitors for the defendants; and

   (c) delete all electronic copies of the Document.

4. The Document currently on the Online Review Book be replaced with a version that redacts page 2564 for privilege.

5. I will hear the parties as to costs.